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IN THE

Supreme Court of the United States

October Term, 1958

NO. 341

RUBY FREDRICKA SHUTTLESWORTH,
by her next friend,
F. L. SHUTTLESWORTH, et al.,
Appellants,

v.

BIRMINGHAM BOARD OF EDUCATION
OF JEFFERSON COUNTY, ALABAMA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

ERNEST D. JACKSON, SR.
410 Broad Street, Suite #208
Jacksonville, Florida

JAMES M. NABRIT, JR.
JAMES A. WASHINGTON, JR.
4302 - 13th Street, N.E.
Washington, D. C.

Attorneys for Appellant

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Northern District of Alabama, Southern Division, entered on May 9, 1958, which denied appellants' application for a final injunction to restrain the enforcement of the Alabama School Placement Law, Act No. 201 of the Legislature of Alabama, Regular Session 1955, as amended by Act. No. 367, Regular Session 1957, General Acts of Alabama 1955, p. 492, as amended by General Act 1957, p. 483, and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Alabama, Southern Division, is not yet reported and is attached hereto as Appendix A.

JURIDICTION

This suit was brought in the United States District Court for the Northern District of Alabama, Southern Division, before a three judge court under 28 U. S. C. Section 2281-2284 to enjoin the Birmingham Board of Education, its members, agents, representatives and employees from enforcing, on grounds of unconstitutionality, the Alabama School Placement Law, Act No. 201 of the Legislature of Alabama, Regular Session, 1955, as amended by Act No. 367, Regular Session 1957, General Acts of Alabama 1955, p. 482, as amended by General Acts 1957, p. 483. The order of the District Court, denying the injunctive relief sought, was entered on May 9, 1958 and Notice of Appeal was filed in that Court on 7th day of July, 1958. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U. S. C. Section 1253 which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of congress to be heard and determined by a district court of three judges."

To sustain the jurisdiction of this Court, this case must

be one which properly invoked three-judge jurisdiction under 28 U. S. C. Section 2281. Under the Code provisions, this Court has stated, the three-judge jurisdiction can be invoked only when the claim of unconstitutionality of a state statute is substantial ex parte Poresky, 290 U. S. 30; California Water Service Co. v City of Redding, 304 U. S. 252. Moreover, in recent years, and principally within the 4th and 5th Circuits, the principle has developed that when the claim of unconstitutionality is asserted against a state statute which is *patently* unconstitutional on its face, the interposition of a three-judge court is not required. *Bush v Orleans Parish School Board*, 138 F. Supp. 336 (E. D. La., 1956)————; *Adkins v The School Board of Newport News*, 148 F. Supp. 430 (E. D. Va., 1957)————.

Based upon the theory and thrust of the complaint in the District Court, the appellants initially urged that the Alabama School Placement Law was patently unconstitutional on its face and hence the matter of litigation could be resolved before a single-judge district court. In the alternative, appellants argued that the claim of unconstitutionality was substantial. On this alternative basis, the District Court assumed jurisdiction as a three-judge court. (R-....., App. pp——.)

QUESTIONS PRESENTED

The United States District Court for the Northern District of Alabama has held that the Alabama School Placement Law is constitutional on its face and that it furnishes the legal machinery for the admission of qualified pupils upon a basis of individual merit without regard to their race or color. The questions presented are:

(1) Whether the Alabama School Placement Law is constitutional on its face when considered in the light of legislative history and Sections 2, 3, 4, 5, 7 and 8 of the Act, the related statutes and resolutions of the State affecting public education, and the history of racial segregation and discrimination in Alabama prior and subsequent to the decision in *Brown v Board of Education.*

(2) Whether the District Court is foreclosed from a constitutional determination of alleged unconstitutional criteria for assignment or transfer of pupils under the Alabama School Placement Law where the law contains some admitted-

ly proper criteria.

(3) Whether the District Court, in foreclosing a consideration of the alleged unconstitutional provisions of the Alabama School Placement Law, may nevertheless decide that the Placement Law is constitutional.

(4) Where, prior to *Brown v Board of Education*, State policy compelled segregation of races in public schools, and where, since the Brown decision, pronouncements and actions by the State evidence a continuance of such policy, and the State passes a School Placement Law which may be applied so as to continue segregation, should pupils asserting a denial of their constitutional rights under such law be compelled to wait until that law is applied in accordance with the State's segregation policy before seeking relief in a federal court.

STATUTES INVOLVED

1955 Act and the 1955 Act as amended by the 1957 Act. Act No. 528, Regular Session, 1957, Vol. II, p. 723.

STATEMENT

The principle facts are related succinctly in the opinion of the District Court:

> "The adult and minor plaintiffs are citizens of the State of Alabama, residing in the City of Birmingham. The minor plaintiffs are eligible to attend the public schools of said City. The Birmingham Board of Education is an agency of the State of Alabama and the City of Birmingham charged by law with responsibility for the operation of public schools in said City.
>
> On August 21, 1957, which was two weeks before the beginning of the 1957-58 school term, the adult plaintiffs filed individual petitions with the Birmingham Board of Education requesting "that appropriate and necessary steps be taken to immediately reorganize the school system so as to provide accommodations for our children in schools of the closest proximity to their homes on a nondiscriminatory basis during the 1957-58 term." The Board referred the handling of said petitions to the Superintendent of City Schools, who, on September 9th and 10th, requesting the adult petitioners to present their minor children on Monday, September 16th, to the Guidance Center at Thomas School, located in Birmingham, Alabama, for the purpose of taking tests.

Meantime, under date of August 28, 1957, the State Superintendent of Education[1] wrote a letter to the adult plaintiffs, in which he stated:

> "I urgently recommend that you fully support your local board of education in its decision in the placement of your child in school. * * * As you consider your petition, I ask you to weigh carefully the following:
>
> "1. More people of your race finished high school in Alabama than in any other state in the Union, irrespective of population, even though some other states have more people of your race.
>
> "2. Elementary teachers of your race received higher average annual salaries than the average of the State because of higher training. The teachers of your race in Alabama are better educated than the average of the Nation. Why should you try to take your children away from such highly trained teachers?
>
> "3. A higher percentage of the children of seven to twenty years of age of your race were enrolled in school last year than the State average.
>
> "4. If you have the best conditions in the Nation as set forth in statements 1, 2 and 3 above, why do you want to change the conditions that produced these gains for you and your people?
>
> "5. On August 28, 1956, the people of Alabama voted to change the Constitution of the State, and thereby abolished the right of education or training of any individual at public expense. Under the 1956 Constitutional Amendment, any public school and all public schools can be abolished and the school buildings can be rented or given to individuals to operate private schools. If you refuse to cooperate with the city board

[1] The plaintiffs do not controvert the averments of the defendant's answer to the effect that:

> "* * * the State Superintendent of Education has not been charged by law with a regulation, function, duty or authority with respect to the eligibility or assignment of the minor plaintiffs or with respect to the management or operation of the Birmingham schools in any respect relevant to the issues in this case."

of education in the school placement of your children, you will in effect invite the abolishment of the public schools. Where would your children be, and where would the children of your friends and your people be in this State without public schools?

"6. Your child has many advantages in having a teacher of your race.

"7. I think you will destroy what you already have if you refuse to cooperate with the decision of the local board of education to place your child in the school they think will be best for your child.

"8. As your State Superintendent of Education, I ask that you agree with your local board of education in the school placement of your child."

Instead of presenting their minor children for tests on September 16, the adult petitioners, by mail, requested an interview with the Superintendent of City Schools, which he refused and informed them that it would be necessary first to present the minor children for tests as theretofore requested. On October 7, the minor petitioners were presented and given tests under the auspices of the Guidance Center. During the early part of November, their parents were interviewed by the Superintendent of City Schools. Admitted are averments to the effect that petitioners have requested a "final determination of their rights to attend the schools located within the closest proximity of their homes on a nondiscriminatory and a nonracial basis," but "the Respondents have not rendered an Opinion admitting or denying the request for assignment of the minor petitioners to the schools requested * * *." The present complaint was filed in the district court on December 18, 1957.

By motion to dismiss, and by answer filed without waiving its motion to dismiss, the Birmingham Board of Education presents the following defenses:

I. This Court is without jurisdiction

II. The action is against the State of Alabama, and is prohibited by the Eleventh Amendment to the Constitution of the United States.

III. The plaintiffs have not exhausted their administrative remedies.

IV. The Alabama School Placement Law is

not unconstitutional on its face, and the plaintiffs have not stated or proved a case upon which relief can be granted.

The case was submitted for decision upon the motion to dismiss, and for final decree upon the merits. The plaintiffs introduced in evidence their petitions, the correspondence passing between them and the Superintendent of City Schools, and the letter written to them by the State Superintendent of Education, none of which were controverted. The effect of the undisputed evidence has already been stated. The parts of the complaint denied by the defendant are those alleging discrimination against the plaintiffs, which are substantially quoted in the margin.[2] As to such disputed parts of their complaint, the plaintiffs offer no evidence, but rely entirely upon the judicial knowledge of the Court as to matters of law, the Acts and Resolutions of the Legislature of Alabama,

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"III

[2] "That in the County of Jefferson and the City of Birmingham, your minor Petitioners, as well as other colored minors similarly situated, are being denied admission to public schools situated and lying within the closest proximity of their homes, respectively, solely because they are not being assigned to public schools other than those they were assigned to or would have been assigned to prior to the ruling of the Supreme Court of the United States in *BROWN v. BOARD OF EDUCATION*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, and *BROWN v EDUCATION*, may 31, 1955, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 653, when said prior assignments to public schools were based almost solely on racial discrimination. This policy of assignment of colored and white pupils to public schools, separated on the basis of race, has been continued and perpetuated since the ruling of the United States Supreme Court in Brown v. Board of Education, Supra, by Legislation passed by the Alabama Legislature declaring as a State policy that:

"'. . . . the decision and orders of the Supreme Court of the United States relating to the separation of races in public schools are, as a matter of right, null, voird, and of no effect and the Legislature of Alabama declares to all men as a matter of right, this State is not bound thereby.'

ACT NO. 42, SPECIAL SESSION, 1956, of the Alabama Legislature, effective February 2, 1956.

* * * * *

"V."

"3. The effect of the above stated provision (Section 2 of Act No. 201) of the Placement Law of Alabama froze the Petitioners in public schools providing for the separation of white and colored pupils irrespective of the nearness of a public school to the Petitioners' respective homes and without any consideration as to the availability of school facilities.

"4. * * * * *

It is obvious that this Alabama Placement Law, being challenged here as to its constitutionality requires the Board of Education to take into consideration, conditions expressly prohibited as reasons for delaying an early and immediate compliance with the United States Supreme

and the history of the period immediately preceding and following the enactment of the Alabama School Placement Law. The ultimate contentions of the plaintiffs are that the Alabama School Placement Law discriminates against them on account of their race or color, and that said law is unconstitutional on its face." (R.—— to ——; App. pp.——.)

THE QUESTIONS ARE SUBSTANTIAL

1. THE ALABAMA SCHOOL PLACEMENT LAW DENIES EQUAL PROTECTION OF LAWS.

a. The Purpose and Intent of the Alabama School Placement Law is to subvert the Constitutional Rights declared by this court in the school segregation cases.

Prior to *Brown v Board of Education*, 347 U. S. 483, the State of Alabama, anticipating a decision adverse to its constitutional and statutory policy of segregation of races, which policy and practice had existed since 1868,[3] appointed

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Court's ruling in Brown v Board of Education, Supra, declaring the fundamental principles that racial discrimination in public education is unconstitutional and in the May 31, 1955 Opinion in Brown V. Board of Education, Supra, ruling that all provisions of Federal, State or local law requiring or permitting such discrimination must yield to this principle * * *.

"VI

"That the Petitioners and those similarly situated are affected adversely and are presently suffering irreparable injury and will continue in the future to suffer irreparable injury by reason of Act No. 201, passed by the Alabama Legislature in its Regular Session in 1955 and became an Act on August 3, 1955 without approval by the Governor requiring local School Boards to carry out a State Policy set forth in said Act and prohibiting their School Boards to act in regards to requests for transfer to schools situated within a closer proximity of their homes relative to the respective Petitioners and others similarly situated without considering an endless list of indefinite factors, a greater portion of which are expressly rejected as an improper consideration for delaying immediate compliance with the United States Supreme Court's ruling in Brown v Board of Education declaring that racial discrimination in public schools is unconstitutional.

"That the effect upon Local School Boards in trying to comply with the provisions of said School Placement Law has resulted in the Respondent School Board prohibiting the Petitioners and others similarly situated, from attending the public schools of Birmingham, Alabama on a nonracial discriminating basis in violation of their right secured by the Fourteenth Amendment of the United States Constitution and declared by the Supreme Court of the United States in its Opinion in Brown v Board of Education, Supra, and other School Segregation cases."

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[3] Pursuant to constitutional authority, the Board of Education passed "An Act to Provide Separate Schools; approved August 11, 1868," Alabama Laws, 1868, p. 148; and in 1875 the Constitution was amended to incorporate requirement for separate schools (Article XII, Sec. 1). The provision was carried forth into the Alabama Constitution of 1901, Sec. 256.

an Interim Committee to prepare "such legislation, including submission of constitutional amendments, as may be required, to protect the interest of the state and its citizens in the event of a decision by the Supreme Court of the United States which destroys or impairs the principle of separation of the races in the public schools of this STATE." Senate Joint Resolution No. 149, adopted September 21, 1953, Acts 1953, p. 1201 following the Brown decisions, the INTERIM COMMITTEE made its report to the Alabama Legislation in 1955, proposing: That the Constitutional provision against prohibition of mixed schools be eliminated; that it be made clear that the state will not compel attendance at mixed schools and will not be obligated to operate mixed schools; and that the greatest possible freedom should be given to the Legislature "to provide or authorize the SCHOOL BOARDS to provide for the various sections in ways better suited to local conditions, after local authorities have exercised their screening power to avoid impairment of educational function, social friction, and potential disorder inconsistent with the education of youth." The report of Alabama Interim Legislative Committee on segregation in the public schools, legislative Document No. 1, Regular Session, 1955.

At the same Session the Legislature of Alabama adopted the original School Placement Act. (ACT NO. 201, GEN. ACTS, 1955, p. 492). That Act repealed the provision of the Alabama Code relating to the separation of races and compulsory school attendance and provided an elaborate and complex scheme for the placement of pupils according to certain standards set forth in the Act (App.—— pp.——).

That following year, 1956, at the first Special Session of the Legislature, the Resolution of Interposition and Nullification was passed (ACT NO. 42, effective February 2, 1956, SPECIAL SESSION, 1956). It is significant to note that the Resolution declared, "The Supreme Court of the United States asserts for its part, that the states did in fact, in 1868, upon the adoption of the Fourteenth Amendment, prohibit unto themselves the power to maintain racially separate public institutions; the State of Alabama, for its part, asserts that it and its sister states have never surrendered such

right * * *."

The Resolution reads in part, "* * * until the issue between the State of Alabama and the general government is decided by the submission to the States pursuant to Article Five of the Constitution, of a suitable Constitutional Amendment that would declare in plain unequivocable language, that the States do surrender their power to maintain public schools and other public facilities on a basis of separation as to race, the legislature of Alabama declares the decision and orders of the Supreme Court of the United States relating to separation of races in the public schools are as a matter of right, null, void, and of no effect; and the legislature of Alabama declares to all men as a matter of right, this State is not bound to abide thereby; we declare further, *our firm intention to take all appropriate measures honorably and constitutionally available to us to avoid this illegal encroachment upon our rights, and to urge upon our sister states their prompt and deliberate efforts to check further encroachment by the general government, through judicial legislation, upon the reserve power of all states.*" (App.—— pp.——.)

During the same Session, ACT NO. 82, effective February 7, 1956, ACTS, SPECIAL SESSION, 1956, p. 119, was passed. The Act proposed as amendments to the Constitution, the elimination of the constitutional requirements of separate schools. The authorization to the legislature to constitute members and employees of school boards as judicial officers, provided that all action taken by such members and employees requiring the exercise of discretion or judgment be considered judicial action and provided that schools may be provided for separate races, and that the minors may make an election to that end.

The proposed amendments were adopted by the people of Alabama in an election held August 28, 1956. On April 14, 1956, by Act No. 117, Special Session, certain amendments were made to the Code of Alabama (1940). Section 93 of Title 52 was amended to provide that the County Board of Education shall provide separate schools for white and colored children whose parents voluntarily elect that such children attend schools with members of their own race. Section 167

of Title 52 was amended to provide that City Boards of Education shall determine on the recommendation of the City Superintendent of Schools, and subject to the provisions of this title the educational policy of the city and shall prescribe rules and regulations for the conduct and management of the City Schools; and that the Board shall provide free schools for all children over 6 years of age and shall provide separate schools for white and colored children whose parents voluntarily elect that such children attend schools with members of their own race. Section 297 of Title 52 was amended to provide that every child between the age of 7 and 16 shall be required to attend school, public or otherwise, and that admission to public schools shall be on an individual basis on the application of the parents and that each child, through his parents, shall have the right to choose whether or not he shall attend a school provided for members of his own race. By the 1957 Amendment to the School Placement Law, Act No. 367, Regular Session, 1957, Sections 93 and 167 of Title 52 were repealed. It does not appear of record, however, that Section 297 was repealed.

At the Regular Session in 1957, the School Placement Law was amended to implement the amended constitutional provisions. (ACT NO. 367, effective August 26, 1957, ACTS, REGULAR SESSION, 1957, VOL. 1, p. 482.) This Act is the School Placement Law which is now in effect in Alabama.

Subsequently, and within the same year, the Legislature passed ACT NO. 528, REGULAR SESSION, 1957, VOL. 2, p. 723. That Act authorizes local school boards to discontinue the operation of any school board, the operation of which is found to be threatened by such tension, friction, or potential disorder or ill-will within the school as substantially to impair effective standards or objectives of education of its pupils, or by potential impairment of peace, order and goodwill in the community (App.——, pp.——).

It is a well established principle that in determining the constitutionality of legislation, a court should examine the legislative history of the same to ascertain the legislative purpose and intent and that acts in pari materia should be construed together. Statutes having the same general pur-

pose, relating to the same class of subjects, constituting parts of the same general plan, and aimed at the accomplishment of the same results are all considered together. *Adkins v School Board of Newport News*, 148 Fed Supp. 430, aff'd 246 Fed. 2d, 325 (4th Cir. 1957); cert. denied—U. S.—78 S. Ct. 83; *Davis v Schnell*, 81 Fed. Sup. 872 aff'd 336 U. S. 933, 93 L. Ed. 1093, 69 Sup. Ct. 749.

If we consider the Interim Committee's report of 1955, and the subsequent enactment of the 1955 School Placement Law, the calling of a Special Session of the Legislature in 1956, and its actions in passing a Resolution of Interposition and Nullification declaring the decisions of the Supreme Court of the United States on school segregation cases null and void and of no effect in Alabama, and the further action of the Special Session in passing of an Act proposing extensive amendments to the Constitution of Alabama and enacting the Acts of April 14, 1956, and the eventual passage of the amended School Placement Law of 1957, together with the Act empowering the local school boards to close the schools of Alabama, where there is potential friction or ill-will within the school or the community, the whole intent and purpose of the School Placement Law becomes crystal clear. That intent and purpose is to subvert the constitutional principle declared in the segregation cases and to prevent nonsegregated public education in Alabama at all costs.

We reject the District Court's view that these matters merely concern motive, and we submit that this history of the School Placement Law and the climate in which it was born demonstrates its purpose and intent. *Adkins v School Board of Newport News*, Supra; *Davis v Schnell*, Supra. Appellants further reject the District Court's opinion as to the significance of the Resolution of Interposition and Nullification. Conceding that it was without the force of law, it was nevertheless a solemn act of the Legislature—not merely a protest of misguided men. It is a declaration of policy of the State of Alabama (See Adkins v School Board of Newport News).

b. The presumption of the constitutionality of the Alabama School Placement Law is limited.

Although it is well settled that the enactment of legislation

carries with it a presumption of constitutionality, the appellants reject the court's broad application of this doctrine. The School Placement Law purports to regulate the transfer of students from a segregated system of schools to a nonsegregated system of schools and therefore it may curtail or limit the exercise of the student's constitutional right to attend public schools on a nonsegregated basis as declared by this court. Viewed in the background of the constitutional and statutory policy and practice of segregation in Alabama prior to 1954 and the legislative history of the School Placement Law, the Placement Act must fall within that class of statutes which are immediately suspect and should be subjected to the most rigid scrutiny. *Korematsu v United States*, 323 U. S. 214, 216; ex parte endo, 323, U. S. 283, 299.

c. The Alabama School Placement Law is unconstitutional on its face.

The practical operation of this statute is unique to say the least. Although Alabama has eliminated from its constitution and statutes express language designating a segregated system of public schools, Section 2 and 3 of the Placement Act continues to compel the separation of races in the public schools by freezing the segregated system which existed under the repealed laws.

Section 4 of the Act purports to be a means whereby a child may escape the unconstitutional restrictions to segregated public schools. Since this Section is only applicable where a child seeks assignment or transfer, it imposes, by requiring certain special tests and qualifications, an unequal burden upon those students who seek to exercise their constitutional right to attend nonsegregated public schools. This is within itself, a denial of equal protection of the laws.

Moreover, Section 4 contains criteria which when read in light of the background of the Placement Law and the decisions of this court, has relevancy only in connection with race and is therefore unconstitutional. In *Brown v Board of Education*, 347 U. S. 483, this court decided that notwithstanding the quality of the physical plant, curricular and other tangible factors, the sociological and psychological effects upon the school child made the separation of races in

the public schools inherently unequal. In the second decision of the *Brown* case, 349 U. S. 294, this court declared that all provisions of Federal, State or Local law requiring or permitting such discrimination must yield to the principle that racial discrimination in public education is unconstitutional. This court further stated the vitality of these principles cannot be allowed to yield simply because of disagreement with them.

Under Section 4, local school boards, in acting upon requests for transfer or assignment, must take into consideration: (1) the psychological qualification of the pupil for the type of teaching and association involved; (2) the physical effect upon the pupil of attendance at a particular school; (3) the possibility or threat of friction or disorder among pupils or others; (4) the possibility of breaches of the peace or ill-will or economic retaliation with the community; (5) the home environment of the pupil; (6) the maintenance or severance of established social and psychological relationships with other pupils and with teachers.

This court has said that because of the separation of races the Negro student has been injured sociologically and psychologically and hence there are sociological and psychological differences between the two races; nevertheless, Section 4 requires a student to meet sociological and psychological standards of equality in order to effectuate a transfer. In other words, the psychological and sociological differences that have resulted from compulsory segregation in public education is under this statute a means for preventing the exercise of the constitutional rights to attend nonsegregated public schools. In a word, the statutes substituted the difference already created for the term "race." And of grave constitutional significance is the fact that under Section 4, local school boards are required to yield to community pressure[4]

[4] Since 1954 only one Negro child has been admitted to a public school on a Non-segregated basis and in that instance, the county board of education withdrew the Negro child because of community pressure. Race Rel. L. Rep. 255 (1956).

The mere fact that Section 4 makes no mention of race is immaterial. The Fourteenth Amendment, like the Fifteenth, "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v Wilson*, 307 U. S. 268, 273; *Smith v Allwright*, 321 U. S. 649; *Guinn v United*, 238 U. S. 347; *Davis v Schnell*, 81 F. Supp. 872, aff'd 336 U. S. 933.

Without extended discussion and without conceding that any provision of the Act is constitutional, the appellants contend that Sections 5, 7 and 8 are unconstitutional. Sections 5 and 8 when read together, *permit* the continuation of segregated schools, contrary to the principle this court announced in the second *Brown* decision.

Section 7 demonstrates the inadaquacy of the administrative procedure established under the Act. The Section makes it practically impossible for the board to reach a decision seasonably. No final order of the board may be entered until each member of the board has personally considered the entire record. Hence with hearings, investigations, and personal consideration of the record in each individual case and with no time limitation within which the board must act, and likewise, no legal means of compelling board action, the proceedings before the board within the framework of the Act are delusive, and as well, subversive of the constitutional principles. Onerous procedural requirement which effectively handicap the rights of those seeking the protection of the Fourteenth Amendment are condemned (*Lane v Wilson*, 307 U. S. 268).

Since the *Brown* decisions some ten states have enacted School Placement or Pupil Assignment Laws[3] in various forms. Excluding the present case there have been at least three (3) cases in which the constitutionality of a School Placement or Pupil Assignment Law has been question. In *Carson v Warlick*, 238 Fed (2d), 724 (4th Cir. 1956) the

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[3] Ala. Acts 1955, No. 201 and 1957, No. 367, General Acts 1955, p. 492, General Acts 1957, p. 483 (Pocket Part, Ala. Code, 1940, Tit. 52, Secs. 61, et seq.); Ark. Stat. Ann. Secs. 80-1519 to -1525 (Supp. 1957); Fla. Stat. Ann. Sec. 230, 231 (Supp. 1956); Miss. Code Ann. Secs. 6334-01 to -08 (Supp. 1956); N. C. Gen. Stat. Secs. 115-176 to -179 (Supp. 1955), as amended, 1956 Extra Sess. Laws, 1 Race Rel. L. Rep. 939 (1956); S. C. Code Sec. 21-230, 21-247 to -247.7 (Supp. 1956); Tenn. Pub. Acts 1957, c. 13; Tex. Sess. Laws 1957, c. 287; Va. Code Ann. Secs. 22-232.1 to 232.16 (Add. Supp. 1956).

School Placement Law of North Carolina was held to be constitutional. But in *Orleans Parish School v Bush*, 242 Fed. (2d), 156 (5th Cir. 1957) and in *Adkins v School Board of Newport News*, 148 Fed. Supp. 430, aff'd 246, Fed (2d) 325 (4th Cir. 1957) the Louisiana and Virginia Pupil Placement Laws were held unconstitutional on their face. In all three cases, this court denied certiorari.

The appellants reject the conclusion of the district court that the Alabama statute is similar to that of North Carolina and urge that when the Alabama School Placement Law is read together with the statute providing for the closing of public schools, it is in every pertinent aspect similar to the history and provisions of the Virginia statue and hence the considered views in *Adkins v School Board of Newport News*, supra, should be controlling and determinative.

2. THE DISTRICT COURT CANNOT FORECLOSE ITSELF FROM CONSIDERING THE UNCONSTITUTIONALITY OF A STATE STATUTE IN ONE BREATH, AND IN ANOTHER DECLARE THE SAME STATUTE TO BE CONSTITUTIONAL UNDER THE PRETENSE OF APPLYING THE FEDERAL EQUITABLE ABSTENTION DOCTRINE.

a. The application of the Federal Equitable Abstention Doctrine would not have required a dismissal of the actions or a determination on the merits but instead, would have relegated the plaintiffs to pursue their actions in the state courts while the district court, retaining jurisdiction would have stayed these proceedings. *Texas v Pullman Company*, 312, U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941); *Government and Civic Employees Committee, CIO v Windsor*, 353 U. S. 364, 77 S. Ct., 838, 1 L. Ed. 2d 894 (1957).

To have required the plaintiffs to seek the Alabama Supreme Court's interpretation of the School Placement Law before a determination as to its unconstitutionality by the federal court, would have denied plaintiffs the relief which was recognized in the first portion of the trial court's opinion, to-wit; exhaustion of the long complex so-called administrative and judicial remedies under the statute.

While the trial court foreclosed itself from a consideration

of the unconstitutionality of the statute because the Supreme Court of Alabama had failed to interpret said statute as observed in its opinion, [4] it nevertheless, declared the Alabama Placement Law constitutional and granted the relief prayed for by the defendant.[5]

While it is contended that the abstention doctrine requires state courts to pass first upon cases involving the unconstitutionality of a state statute, nevertheless, this court has recognized a limitation of the application of this doctrine. As we pointed out in *Alabama Public Service Commission v Southern Railroad Company*, 341 U. S. 341, 344, (1951), proceedings in a federal trial court should be stayed only where there is involved "construction of a state statute so ill defined that a federal court should hold the case pending a definitive construction of that statute in state courts." And as was observed by Mr. Justice Douglas in his dissent on the ground that the statute was clear and unambiguous as applied to the particular plaintiffs, and the questions involved did not turn upon "any niceties in the interpretation involved did not turn upon "any niceties in the interpretation of the Michigan law," *Albertson v Millard*, 345 U. S. 242, 73 S. Ct. 600, 97 L. Ed. 983 (1953). It is the contention of the plaintiffs that the Alabama Placement Law is not ambiguous as to its meaning nor as to its application to the plaintiffs involved and therefore we must reject the application of the absention doctrine as was apparently, in fact, rejected by the trial court itself in that, said court failed to stay the proceedings as would have been the court's action in applying the doctrine, but instead ruled on the merits and rendered an opinion in favor of the defendant.

As was held in *Propper v Clark*, 337 U. S. 472, 492:

> "The submission of special issues is a useful device in judicial administration in such circumstances as existed in the Magnolia Case, 309 U. S. 478, 84 L. Ed. 876, 60 S. Ct. 628, 42 Am. Bankr. N. S. 216; Spector Case, 323 U. S. 101, 89 L. Ed. 101, 65 S. Ct. 152; Fieldcrest Case, 316 U. S. 168, 86 L. Ed. 1355, 62 S. Ct. 986, and the Pullman Case, 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643, all supra, but in the absence of special circumstances, 320 U. S. at 236, 237, 88 L. Ed. 14, 15, 64 S. Ct. 7, it is not to be used

> to impede the normal course of action where federal courts have been granted jurisdiction of the controversy.
>
> We reject the suggestion that a decision in this case in the federal courts should be delayed until the courts of New York have settled the issue of state law."

See also, *Public Utilities Commission v United Fuel Gas Company*, 317 U. S. 456, 468-469; *Romero v Weakley*, 226 F 2d 399 (9th Cir., 1955); Cf. *Hillsboro Township v Cromwell*, 326 U. S. 620, 628-9; *Mitchell v Wright*, 154 F 2d 924 (5th Cir., 1946). As on the uncontradicted facts and the clear law, the statute involved here is unconstitutional upon its face and should have been declared so by the trial court. The plaintiffs should have been granted the injunctive relief prayed for.

We believe therefore, that the questions presented by the appeal are substantial and that they are of public importance.

Respectfully submitted,

ERNEST D. JACKSON, SR.
410 Broad Street, Suite #208
Jacksonville, Florida

James M. Nabrit, Jr.
James A. Washington, Jr.
Washington, D. C.